

HOUSE BILL 1370

P2

2lr0143

By: **Chair, Health and Government Operations Committee (By Request –
Departmental – Transportation) (By Request – Departmental –
Minority Affairs, Office of)**

Introduced and read first time: February 22, 2012

Assigned to: Rules and Executive Nominations

A BILL ENTITLED

1 AN ACT concerning

2 **Procurement – Minority Business Participation**

3 FOR the purpose of establishing certain legislative findings; replacing a certain
4 numerical percentage goal with a biennial process by which the State's overall
5 minority business enterprise participation goal shall be established, based on
6 certain factors, and adopted by regulation; requiring the Special Secretary of
7 Minority Affairs, in consultation with the Secretary of Transportation and the
8 Attorney General, to establish certain guidelines biennially for units to follow
9 while determining whether to set certain subgoals for certain minority groups;
10 clarifying the factors to be used by certain units in evaluating each contract to
11 determine the appropriate minority business enterprise participation goals for
12 the contract; requiring certain units to monitor and collect certain data and
13 institute corrective actions relating to contractor compliance; prohibiting the
14 use of quotas and certain goal setting processes; requiring the Special Secretary
15 of Minority Affairs, in consultation with the Secretary of Transportation and the
16 Attorney General, to establish through regulation certain procedures related to
17 participation of minority business enterprises as prime contractors; establishing
18 circumstances under which a minority business enterprise participation
19 schedule may not be amended; clarifying that minority business enterprise
20 participation schedules are part of certain contracts; prohibiting a contractor
21 from terminating certified minority business enterprises under certain
22 circumstances; requiring that certain bidders or offerors complete certain
23 documents; requiring that certain documents completed by bidders or offerors
24 be made part of certain contracts; requiring that all contracts relating to
25 minority business enterprise participation contain certain provisions;
26 continuing until a certain date the provisions of the State Procurement Law
27 relating to procurement from minority businesses; requiring the certification
28 agency, in consultation with the General Assembly and the Office of the
29 Attorney General, to initiate a certain study of the Minority Business

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 Enterprise Program for certain purposes; authorizing the Board of Public Works
2 to adopt certain regulations; requiring the final report of the study to be
3 submitted to the Legislative Policy Committee before a certain date; making the
4 provisions of this Act severable; defining certain terms; and generally relating
5 to minority business participation in State procurement.

6 BY repealing and reenacting, with amendments,
7 Article – State Finance and Procurement
8 Section 14–301, 14–302, 14–303, and 14–309
9 Annotated Code of Maryland
10 (2009 Replacement Volume and 2011 Supplement)

11 BY adding to
12 Article – State Finance and Procurement
13 Section 14–301.1
14 Annotated Code of Maryland
15 (2009 Replacement Volume and 2011 Supplement)

16 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
17 MARYLAND, That the Laws of Maryland read as follows:

18 **Article – State Finance and Procurement**

19 14–301.

20 (a) In this subtitle the following words have the meanings indicated.

21 (b) “Certification” means the determination that a legal entity is a minority
22 business enterprise for the purposes of this subtitle.

23 (c) “Certification agency” means the agency designated by the Board of
24 Public Works under § 14–303(b) of this subtitle to certify and decertify minority
25 business enterprises.

26 (d) “Certified minority business enterprise” means a minority business
27 enterprise that holds a certification.

28 (e) “Economically disadvantaged individual” means a socially disadvantaged
29 individual whose ability to compete in the free enterprise system has been impaired
30 due to diminished capital and credit opportunities as compared to others in the same
31 or similar line of business who are not socially disadvantaged.

32 (f) (1) “Minority business enterprise” means any legal entity, except a
33 joint venture, that is:

34 (i) organized to engage in commercial transactions;

1 (ii) at least 51% owned and controlled by 1 or more individuals
2 who are socially and economically disadvantaged; and

3 (iii) managed by, and the daily business operations of which are
4 controlled by, one or more of the socially and economically disadvantaged individuals
5 who own it.

6 (2) “Minority business enterprise” includes a not for profit entity
7 organized to promote the interests of physically or mentally disabled individuals.

8 **(G) “MINORITY BUSINESS ENTERPRISE PARTICIPATION SCHEDULE”**
9 **MEANS A SCHEDULE INCLUDED IN THE SUBMISSION OF A BID OR OFFER THAT**
10 **IDENTIFIES:**

11 **(1) THE CERTIFIED MINORITY BUSINESS ENTERPRISES THAT A**
12 **BIDDER OR OFFEROR AGREES TO USE IN THE PERFORMANCE OF THE**
13 **CONTRACT; AND**

14 **(2) THE PERCENTAGE OF CONTRACT VALUE ATTRIBUTED TO**
15 **EACH CERTIFIED MINORITY BUSINESS ENTERPRISE.**

16 **[(g)] (H)** (1) Subject to paragraphs (2) and (3) of this subsection,
17 “personal net worth” means the net value of the assets of an individual remaining
18 after total liabilities are deducted.

19 (2) “Personal net worth” includes the individual’s share of assets held
20 jointly or as community property with the individual’s spouse.

21 (3) “Personal net worth” does not include:

22 (i) the individual’s ownership interest in the applicant or a
23 certified minority business enterprise;

24 (ii) the individual’s equity in his or her primary place of
25 residence; or

26 (iii) up to \$500,000 of the cash value of any qualified retirement
27 savings plans or individual retirement accounts.

28 **[(h)] (I)** “Race-neutral measure” means a method that is or can be used to
29 assist all small businesses.

30 **[(i)] (J)** (1) Subject to paragraphs (2) and (3) of this subsection, **AND IN**
31 **ACCORDANCE WITH THE STATE’S MOST RECENT DISPARITY STUDY,** “socially and
32 economically disadvantaged individual” means a citizen or lawfully admitted
33 permanent resident of the United States who is:

1 (i) in any of the following minority groups:

2 1. African American – an individual having origins in
3 any of the black racial groups of Africa;

4 2. American Indian/Native American – an individual
5 having origins in any of the original peoples of North America and who is a
6 documented member of a North American tribe, band, or otherwise has a special
7 relationship with the United States or a state through treaty, agreement, or some
8 other form of recognition. This includes an individual who claims to be an American
9 Indian/Native American and who is regarded as such by the American Indian/Native
10 American community of which the individual claims to be a part, but does not include
11 an individual of Eskimo or Aleutian origin;

12 3. Asian – an individual having origins in the Far East,
13 Southeast Asia, or the Indian subcontinent, and who is regarded as such by the
14 community of which the person claims to be a part;

15 4. Hispanic – an individual of Mexican, Puerto Rican,
16 Cuban, Central or South American, or other Spanish culture or origin, regardless of
17 race, and who is regarded as such by the community of which the person claims to be a
18 part;

19 5. physically or mentally disabled – an individual who
20 has an impairment that substantially limits one or more major life activities, who is
21 regarded generally by the community as having such a disability, and whose disability
22 has substantially limited his or her ability to engage in competitive business; or

23 6. women – a woman, regardless of race or ethnicity; or

24 (ii) otherwise found by the certification agency to be a socially
25 and economically disadvantaged individual.

26 (2) There is a rebuttable presumption that an individual who is a
27 member of a minority group under paragraph (1)(i) of this subsection is socially and
28 economically disadvantaged.

29 (3) An individual whose personal net worth exceeds \$1,500,000, as
30 adjusted annually for inflation according to the Consumer Price Index, may not be
31 found to be economically disadvantaged.

32 **[(j)] (K)** “Socially disadvantaged individual” means an individual who has
33 been subjected to racial or ethnic prejudice or cultural bias within American society
34 because of membership in a group and without regard to individual qualities. Social
35 disadvantage must stem from circumstances beyond the control of the individual.

1 14-301.1.

2 THE GENERAL ASSEMBLY FINDS THE FOLLOWING:

3 (1) THE STATE OF MARYLAND WISHES TO PROVIDE ALL OF ITS
4 CITIZENS WITH EQUAL ACCESS TO BUSINESS FORMATION AND BUSINESS
5 GROWTH OPPORTUNITIES;

6 (2) THE ELIMINATION OF DISCRIMINATION AGAINST
7 MINORITY- AND WOMEN-OWNED BUSINESSES IS OF PARAMOUNT IMPORTANCE
8 TO THE FUTURE WELFARE OF THE STATE;

9 (3) THE GENERAL ASSEMBLY HAS RECEIVED AND CAREFULLY
10 REVIEWED THE DISPARITY STUDY ENTITLED "THE STATE OF MINORITY- AND
11 WOMEN-OWNED BUSINESS ENTERPRISE: EVIDENCE FROM MARYLAND"
12 COMMISSIONED BY THE GENERAL ASSEMBLY AND PUBLISHED ON FEBRUARY
13 17, 2011 (THE STUDY), AND FINDS THAT THE STUDY PROVIDES A STRONG BASIS
14 IN EVIDENCE DEMONSTRATING PERSISTENT DISCRIMINATION AGAINST
15 MINORITY- AND WOMEN-OWNED BUSINESSES;

16 (4) BASED ON ITS REVIEW OF THE STUDY, THE GENERAL
17 ASSEMBLY FINDS THAT:

18 (I) THERE ARE SUBSTANTIAL AND STATISTICALLY
19 SIGNIFICANT ADVERSE DISPARITIES BETWEEN THE AVAILABILITY AND
20 UTILIZATION OF MINORITIES AND WOMEN IN THE PRIVATE SECTOR IN THE SAME
21 GEOGRAPHIC MARKETS AND INDUSTRY CATEGORIES IN WHICH THE STATE DOES
22 BUSINESS;

23 (II) THE STATE WOULD BECOME A PASSIVE PARTICIPANT IN
24 PRIVATE SECTOR RACIAL AND GENDER DISCRIMINATION IF IT CEASED OR
25 CURTAILED ITS REMEDIAL EFFORTS, INCLUDING THE OPERATION OF THE
26 MINORITY BUSINESS ENTERPRISE PROGRAM;

27 (III) THERE ARE SUBSTANTIAL AND STATISTICALLY
28 SIGNIFICANT ADVERSE DISPARITIES FOR ALL RACIAL AND ETHNIC GROUPS AND
29 NONMINORITY WOMEN COMBINED IN ALL MAJOR CONTRACTING CATEGORIES IN
30 STATE PROCUREMENT;

31 (IV) THERE ARE SUBSTANTIAL AND STATISTICALLY
32 SIGNIFICANT ADVERSE DISPARITIES FOR ALL INDIVIDUAL RACIAL AND ETHNIC
33 GROUPS AND FOR NONMINORITY WOMEN IN MOST MAJOR INDUSTRY
34 CATEGORIES IN STATE PROCUREMENT;

1 **(V) THERE IS AMPLE EVIDENCE THAT DISCRIMINATION IN**
2 **THE PRIVATE SECTOR HAS DEPRESSED FIRM FORMATION AND FIRM GROWTH**
3 **AMONG MINORITY AND NONMINORITY WOMEN ENTREPRENEURS; AND**

4 **(VI) THERE IS POWERFUL AND PERSUASIVE QUALITATIVE**
5 **AND ANECDOTAL EVIDENCE OF DISCRIMINATION AGAINST MINORITY AND**
6 **NONMINORITY WOMEN BUSINESS OWNERS IN BOTH THE PUBLIC AND PRIVATE**
7 **SECTORS;**

8 **(5) AS A RESULT OF ONGOING DISCRIMINATION AND THE**
9 **PRESENT DAY EFFECTS OF PAST DISCRIMINATION, MINORITY- AND**
10 **WOMEN-OWNED BUSINESSES COMBINED CONTINUE TO BE VERY SIGNIFICANTLY**
11 **UNDERUTILIZED RELATIVE TO THEIR AVAILABILITY TO PERFORM WORK IN THE**
12 **SECTORS IN WHICH THE STATE DOES BUSINESS;**

13 **(6) MINORITY PRIME CONTRACTORS ALSO ARE SUBJECT TO**
14 **DISCRIMINATION AND CONFRONT ESPECIALLY DAUNTING BARRIERS IN**
15 **ATTEMPTING TO COMPETE WITH VERY LARGE AND LONG-ESTABLISHED**
16 **NONMINORITY COMPANIES;**

17 **(7) DESPITE THE FACT THAT THE STATE HAS EMPLOYED, AND**
18 **CONTINUES TO EMPLOY, NUMEROUS AND ROBUST RACE-NEUTRAL**
19 **REMEDIES, INCLUDING AGGRESSIVE OUTREACH AND ADVERTISING, TRAINING**
20 **AND EDUCATION, SMALL BUSINESS PROGRAMS, EFFORTS TO IMPROVE ACCESS**
21 **TO CAPITAL, AND OTHER EFFORTS, THERE IS A STRONG BASIS IN EVIDENCE**
22 **THAT DISCRIMINATION PERSISTS EVEN IN PUBLIC SECTOR PROCUREMENT**
23 **WHERE THESE EFFORTS HAVE BEEN EMPLOYED;**

24 **(8) THIS SUBTITLE ENSURES THAT RACE-NEUTRAL EFFORTS**
25 **WILL BE USED TO THE MAXIMUM EXTENT FEASIBLE AND THAT**
26 **RACE-CONSCIOUS MEASURES WILL BE USED ONLY WHERE NECESSARY TO**
27 **ELIMINATE DISCRIMINATION THAT WAS NOT ALLEVIATED BY RACE-NEUTRAL**
28 **EFFORTS;**

29 **(9) THIS SUBTITLE CONTINUES AND ENHANCES EFFORTS TO**
30 **ENSURE THAT THE STATE LIMITS THE BURDEN ON NONMINORITY BUSINESSES**
31 **AS MUCH AS POSSIBLE BY ENSURING THAT ALL GOALS ARE DEVELOPED USING**
32 **THE BEST AVAILABLE DATA AND THAT WAIVERS ARE AVAILABLE WHENEVER**
33 **CONTRACTORS MAKE GOOD FAITH EFFORTS; AND**

34 **(10) STATE EFFORTS TO SUPPORT THE DEVELOPMENT OF**
35 **COMPETITIVELY VIABLE MINORITY- AND WOMEN-OWNED BUSINESS**

1 **ENTERPRISES WILL ASSIST IN REDUCING DISCRIMINATION AND CREATING JOBS**
2 **FOR ALL CITIZENS OF MARYLAND.**

3 14-302.

4 (a) (1) (i) Except for leases of real property, each unit shall structure
5 procurement procedures, consistent with the purposes of this subtitle, to try to achieve
6 an overall **PERCENTAGE** goal [of 25%] of the unit's total dollar value of procurement
7 contracts being made directly or indirectly to certified minority business enterprises.

8 (II) 1. **THE OVERALL PERCENTAGE GOAL SHALL BE**
9 **ESTABLISHED ON A BIENNIAL BASIS BY THE SPECIAL SECRETARY OF MINORITY**
10 **AFFAIRS, IN CONSULTATION WITH THE SECRETARY OF TRANSPORTATION AND**
11 **THE ATTORNEY GENERAL.**

12 2. **DURING ANY YEAR IN WHICH THERE IS A DELAY**
13 **IN ESTABLISHING THE OVERALL GOAL, THE PREVIOUS YEAR'S GOAL WILL**
14 **APPLY.**

15 [(ii)] (III) 1. In consultation with the [State Department]
16 **SECRETARY** of Transportation and the [Office of the] Attorney General, the
17 [Governor's Office] **SPECIAL SECRETARY** of Minority Affairs shall establish
18 guidelines **ON A BIENNIAL BASIS** for each unit to consider while determining whether
19 to set subgoals for the minority groups listed in [§ 14-301(i)(1)(i)1, 2, 3, 4,] §
20 **14-301(J)(1)(I)1, 2, 3, 4,** and 6 of this subtitle.

21 2. **DURING ANY YEAR IN WHICH THERE IS A DELAY**
22 **IN ESTABLISHING THE SUBGOAL GUIDELINES, THE PREVIOUS YEAR'S SUBGOAL**
23 **GUIDELINES WILL APPLY.**

24 (IV) **THE SPECIAL SECRETARY OF MINORITY AFFAIRS, IN**
25 **CONSULTATION WITH THE SECRETARY OF TRANSPORTATION AND THE**
26 **ATTORNEY GENERAL, SHALL ESTABLISH GOALS AND SUBGOAL GUIDELINES**
27 **THAT, TO THE MAXIMUM EXTENT FEASIBLE, APPROXIMATE THE LEVEL OF**
28 **MINORITY BUSINESS ENTERPRISE PARTICIPATION THAT WOULD BE EXPECTED**
29 **IN THE ABSENCE OF DISCRIMINATION.**

30 (V) **IN ESTABLISHING OVERALL GOALS, THE FACTORS TO BE**
31 **CONSIDERED SHALL INCLUDE:**

32 1. **THE RELATIVE AVAILABILITY OF MINORITY- AND**
33 **WOMEN-OWNED BUSINESSES TO PARTICIPATE IN STATE PROCUREMENT AS**
34 **DEMONSTRATED BY THE STATE'S MOST RECENT DISPARITY STUDY;**

1 **2. PAST PARTICIPATION OF MINORITY BUSINESS**
2 **ENTERPRISES IN STATE PROCUREMENT, EXCEPT FOR PROCUREMENT RELATED**
3 **TO LEASES OF REAL PROPERTY; AND**

4 **3. OTHER FACTORS THAT CONTRIBUTE TO**
5 **CONSTITUTIONAL GOAL SETTING.**

6 **(VI) NOTWITHSTANDING § 12-101 OF THIS ARTICLE, THE**
7 **SPECIAL SECRETARY OF MINORITY AFFAIRS SHALL ADOPT REGULATIONS**
8 **SETTING FORTH THE STATE'S OVERALL GOAL.**

9 (2) Each unit shall:

10 (i) consider the practical severability of ALL contracts AND, IN
11 **ACCORDANCE WITH § 11-201 OF THIS ARTICLE, MAY NOT BUNDLE CONTRACTS;**
12 **[and]**

13 (ii) implement a program that will enable the unit to evaluate
14 each contract to determine the appropriate minority business enterprise participation
15 goals, **IF ANY**, for the contract based[, in part,] on:

16 1. the potential subcontract opportunities available in
17 the prime procurement contract;

18 2. the availability of certified minority business
19 enterprises to respond competitively to the potential subcontract opportunities; **[and]**

20 3. the guidelines established under paragraph (1)(ii) of
21 this subsection; **AND**

22 **4. OTHER FACTORS THAT CONTRIBUTE TO**
23 **CONSTITUTIONAL GOAL SETTING;**

24 **(III) MONITOR AND COLLECT DATA WITH RESPECT TO PRIME**
25 **CONTRACTOR COMPLIANCE WITH CONTRACT GOALS; AND**

26 **(IV) INSTITUTE CORRECTIVE ACTION WHEN PRIME**
27 **CONTRACTORS DO NOT MAKE GOOD-FAITH EFFORTS TO COMPLY WITH**
28 **CONTRACT GOALS.**

29 **(3) UNITS MAY NOT USE QUOTAS OR ANY PROJECT**
30 **GOAL-SETTING PROCESS THAT:**

1 **(I) SOLELY RELIES ON THE STATE’S OVERALL NUMERICAL**
2 **GOAL, OR ANY OTHER JURISDICTION’S OVERALL NUMERICAL GOAL; OR**

3 **(II) FAILS TO INCORPORATE THE ANALYSIS OUTLINED IN**
4 **PARAGRAPH (2)(II) OF THIS SUBSECTION.**

5 **[(3)] (4)** (i) A woman who is also a member of an ethnic or racial
6 minority group may be certified in that category in addition to the gender category.

7 (ii) For purposes of achieving the goals in this subsection, a
8 certified minority business enterprise may participate in a procurement contract and
9 be counted as a woman-owned business, or as a business owned by a member of an
10 ethnic or racial group, but not both, if the business has been certified in both
11 categories.

12 **[(4)] (5)** Each unit shall meet the maximum feasible portion of the
13 **[goals] STATE’S OVERALL GOAL** established in accordance with this subsection by
14 using race-neutral measures to facilitate minority business enterprise participation in
15 the procurement process.

16 **[(5)] (6)** If a unit establishes minority business enterprise
17 participation goals for a contract, a contractor, including a contractor that is a certified
18 minority business enterprise, shall:

19 (i) identify specific work categories appropriate for
20 subcontracting;

21 (ii) at least 10 days before bid opening, solicit minority business
22 enterprises, through written notice that:

23 1. describes the categories of work under item (i) of this
24 paragraph; and

25 2. provides information regarding the type of work being
26 solicited and specific instructions on how to submit a bid;

27 (iii) attempt to make personal contact with the firms in item (ii)
28 of this paragraph;

29 (iv) offer to provide reasonable assistance to minority business
30 enterprises to fulfill bonding requirements or to obtain a waiver of those requirements;

31 (v) in order to publicize contracting opportunities to minority
32 business enterprises, attend prebid or preproposal meetings or other meetings
33 scheduled by the unit; and

1 (vi) upon acceptance of a bid or proposal, provide the unit with a
2 list of minority businesses with whom the contractor negotiated, including price quotes
3 from minority and nonminority firms.

4 (7) THE SPECIAL SECRETARY OF MINORITY AFFAIRS SHALL:

5 (I) IN CONSULTATION WITH THE SECRETARY OF
6 TRANSPORTATION AND THE ATTORNEY GENERAL, ESTABLISH PROCEDURES
7 GOVERNING HOW THE PARTICIPATION OF MINORITY BUSINESS ENTERPRISE
8 PRIME CONTRACTORS IS COUNTED TOWARD CONTRACT GOALS; AND

9 (II) NOTWITHSTANDING § 12-101 OF THIS ARTICLE, ADOPT
10 REGULATIONS SETTING FORTH THE PROCEDURES ESTABLISHED IN
11 ACCORDANCE WITH THIS PARAGRAPH.

12 ~~[(6)]~~ (8) (i) 1. If a contractor, INCLUDING A CERTIFIED
13 MINORITY BUSINESS ENTERPRISE, does not achieve all or a part of the minority
14 business enterprise participation goals on a contract, the unit shall make a finding of
15 whether the contractor has demonstrated that the contractor took all necessary and
16 reasonable steps to achieve the goals, including compliance with paragraph ~~[(5)]~~ (6) of
17 this subsection.

18 2. A waiver of any part of the minority business
19 enterprise goals for a contract shall be granted if a contractor provides a reasonable
20 demonstration of good-faith efforts to achieve the goals.

21 (ii) If the unit determines that a waiver should be granted in
22 accordance with subparagraph (i) of this paragraph, the unit may not require the
23 contractor to renegotiate any subcontract in order to achieve a different result.

24 (iii) The head of the unit may waive any of the requirements of
25 this subsection relating to the establishment, use, and waiver of contract goals for a
26 sole source, expedited, or emergency procurement in which the public interest cannot
27 reasonably accommodate use of those requirements.

28 (iv) 1. Except for waivers granted in accordance with
29 subparagraph (iii) of this paragraph, when a waiver determination is made, the unit
30 shall issue the determination in writing.

31 2. The head of the unit shall:

32 A. keep one copy of the waiver determination and the
33 reasons for the determination; and

34 B. forward one copy of the waiver determination to the
35 Governor's Office of Minority Affairs.

1 (v) On or before July 31 of each year, each unit shall submit
2 directly to the Board of Public Works and the Governor's Office of Minority Affairs an
3 annual report of waivers requested and waivers granted under this paragraph.

4 (vi) The report required under subparagraph (v) of this
5 paragraph shall contain the following information on those contracts where the unit
6 considered a contractor's request for waiver of all or a portion of the minority business
7 enterprise goals:

- 8 1. the contract titles, numbers, and dates;
- 9 2. the number of waiver requests received;
- 10 3. the number of waiver requests granted; and
- 11 4. any other information specifically requested by the
12 Board.

13 [(7) (9) (i) [In this paragraph, "MBE participation schedule"
14 means a schedule included in the submission of a bid or offer that identifies:

- 15 1. the certified minority business enterprises that a
16 bidder or offeror agrees to use in the performance of the contract; and
- 17 2. the percentage of contract value attributed to each
18 certified minority business enterprise.

19 (ii) 1. This paragraph applies to a bidder or offeror after
20 submission of a bid or proposal and before the execution of a contract with an expected
21 degree of minority business enterprise participation.

22 2. If the bidder or offeror determines that a minority
23 business enterprise identified in the [MBE] MINORITY BUSINESS ENTERPRISE
24 participation schedule has become or will become unavailable or [is] ineligible to
25 perform the work required under the contract, the bidder or offeror shall notify the
26 unit within 72 hours of making the determination.

27 [(iii) (II) 1. If a minority business enterprise identified in
28 the [MBE] MINORITY BUSINESS ENTERPRISE participation schedule submitted with
29 a bid or offer has become or will become unavailable or [is] ineligible to perform the
30 work required under the contract, the bidder or offeror may submit a written request
31 with the unit to amend the [MBE] MINORITY BUSINESS ENTERPRISE participation
32 schedule.

1 2. The request to amend the [MBE] MINORITY
2 BUSINESS ENTERPRISE participation schedule shall indicate the bidder's or offeror's
3 efforts to substitute another certified minority business enterprise to perform the work
4 that the unavailable or ineligible minority business enterprise would have performed.

5 [3. Except as provided in subsubparagraph 4 of this
6 subparagraph, an MBE]

7 **(III) A MINORITY BUSINESS ENTERPRISE** participation
8 schedule may not be amended unless:

9 **1. THE BIDDER OR OFFEROR PROVIDES A**
10 **SATISFACTORY EXPLANATION OF THE REASON FOR INCLUSION OF THE**
11 **UNAVAILABLE OR INELIGIBLE FIRM ON THE MINORITY BUSINESS ENTERPRISE**
12 **PARTICIPATION SCHEDULE; AND**

13 **2. the amendment is approved by the unit's**
14 **procurement officer after consulting with the unit's [MBE] MINORITY BUSINESS**
15 **ENTERPRISE liaison.**

16 **(10) (I) THIS PARAGRAPH APPLIES AFTER EXECUTION OF A**
17 **CONTRACT WITH AN EXPECTED DEGREE OF MINORITY BUSINESS ENTERPRISE**
18 **PARTICIPATION.**

19 **(II) THE MINORITY BUSINESS ENTERPRISE PARTICIPATION**
20 **SCHEDULE, INCLUDING ANY AMENDMENT, SHALL BE ATTACHED TO AND MADE A**
21 **PART OF THE EXECUTED CONTRACT.**

22 **(III) 1. A CONTRACTOR MAY NOT TERMINATE OR**
23 **OTHERWISE CANCEL THE CONTRACT OF A CERTIFIED MINORITY BUSINESS**
24 **ENTERPRISE SUBCONTRACTOR LISTED IN THE MINORITY BUSINESS**
25 **ENTERPRISE PARTICIPATION SCHEDULE WITHOUT SHOWING GOOD CAUSE AND**
26 **OBTAINING THE PRIOR WRITTEN CONSENT OF THE MINORITY BUSINESS**
27 **ENTERPRISE LIAISON AND APPROVAL OF THE HEAD OF THE UNIT.**

28 **2. THE UNIT SHALL SEND A COPY OF THE WRITTEN**
29 **CONSENT OBTAINED UNDER SUBSUBPARAGRAPH 1 OF THIS SUBPARAGRAPH TO**
30 **THE GOVERNOR'S OFFICE OF MINORITY AFFAIRS.**

31 [4.] **(IV) [An MBE] A MINORITY BUSINESS**
32 **ENTERPRISE** participation schedule may not be amended after the date of contract
33 execution unless the request is approved by the head of the unit and the contract is
34 amended.

1 **[(8)] (11)** If, during the performance of a contract, a certified minority
2 business enterprise contractor or subcontractor becomes ineligible to participate in the
3 Minority Business Enterprise Program because one or more of its owners has a
4 personal net worth that exceeds the amount specified in § 14–301(i)(3) of this subtitle:

5 (i) that ineligibility alone may not cause the termination of the
6 certified minority business enterprise’s contractual relationship for the remainder of
7 the term of the contract; and

8 (ii) the certified minority business enterprise’s participation
9 under the contract shall continue to be counted toward the program and contract
10 goals.

11 (b) (1) The provisions of §§ 14–301(f) and 14–303 of this subtitle and
12 subsection (a) of this section are inapplicable to the extent that any unit determines
13 the provisions to be in conflict with any applicable federal program requirement.

14 (2) The determination under this subsection shall be included with the
15 report required under § 14–305 of this subtitle.

16 14–303.

17 (a) (1) (i) In accordance with Title 10, Subtitle 1 of the State
18 Government Article, the Board shall adopt regulations consistent with the purposes of
19 this Division II to carry out the requirements of this subtitle.

20 (ii) The Board shall keep a record of information regarding any
21 waivers requested in accordance with ~~§ 14–302(a)(5)(i)~~ **§ 14–302(A)(8)(I)** of this
22 subtitle and subsection ~~[(b)(8)] (B)(11)~~ of this section and submit a copy of the record
23 to the General Assembly on or before October 1 of each year, in accordance with §
24 2–1246 of the State Government Article.

25 (iii) The Board shall keep a record of the aggregate number and
26 the identity of minority business enterprises that receive certification under the
27 process established by the Board under subsection (b)(1) of this section and submit a
28 copy of the record to the General Assembly on or before October 1 of each year, in
29 accordance with § 2–1246 of the State Government Article.

30 (2) The regulations shall establish procedures to be followed by units,
31 prospective contractors, and successful bidders or offerors to maximize notice to, and
32 the opportunity to participate in the procurement process by, a broad range of
33 minority business enterprises.

34 (b) These regulations shall include:

35 (1) provisions:

1 (i) designating one State agency to certify and decertify
2 minority business enterprises for all units through a single process that meets
3 applicable federal requirements, including provisions that promote and facilitate the
4 submission of some or all of the certification application through an electronic process;

5 (ii) for the purpose of certification under this subtitle, that
6 promote and facilitate certification of minority business enterprises that have received
7 certification from the U.S. Small Business Administration or a county that uses a
8 certification process substantially similar to the process established in accordance
9 with item (i) of this item;

10 (iii) requiring the agency designated to certify minority business
11 enterprises to complete the agency's review of an application for certification and
12 notify the applicant of the agency's decision within 90 days of receipt of a complete
13 application that includes all of the information necessary for the agency to make a
14 decision; and

15 (iv) authorizing the agency designated to certify minority
16 business enterprises to extend the notification requirement established under item (iii)
17 of this item once, for no more than an additional 60 days, if the agency provides the
18 applicant with a written notice and explanation;

19 (2) a requirement that the solicitation document accompanying each
20 solicitation set forth the expected degree of minority business enterprise participation
21 based, in part, on the factors set forth in § 14-302(a)(2)(ii) of this subtitle;

22 **(3) A REQUIREMENT THAT BIDDERS OR OFFERORS COMPLETE A**
23 **DOCUMENT SETTING FORTH THE PERCENTAGE OF THE TOTAL DOLLAR AMOUNT**
24 **OF THE CONTRACT THAT THE BIDDER OR OFFEROR AGREES WILL BE**
25 **PERFORMED BY CERTIFIED MINORITY BUSINESS ENTERPRISES;**

26 **(4) A REQUIREMENT THAT THE SOLICITATION DOCUMENTS**
27 **COMPLETED AND SUBMITTED BY THE BIDDER OR OFFEROR IN CONNECTION**
28 **WITH ITS MINORITY BUSINESS ENTERPRISE PARTICIPATION COMMITMENT MUST**
29 **BE ATTACHED TO AND MADE A PART OF THE CONTRACT;**

30 **(5) A REQUIREMENT THAT ALL CONTRACTS CONTAINING**
31 **MINORITY BUSINESS ENTERPRISE PARTICIPATION GOALS SHALL CONTAIN A**
32 **LIQUIDATED DAMAGES PROVISION THAT APPLIES IN THE EVENT THAT THE**
33 **CONTRACTOR FAILS TO COMPLY IN GOOD FAITH WITH THE PROVISIONS OF THIS**
34 **SUBTITLE OR THE PERTINENT TERMS OF THE APPLICABLE CONTRACT;**

35 **[(3)] (6)** a requirement that the unit provide a current list of certified
36 minority business enterprises to each prospective contractor;

1 **[(4)] (7)** provisions to ensure the uniformity of requests for bids on
2 subcontracts;

3 **[(5)] (8)** provisions relating to the timing of requests for bids on
4 subcontracts and of submission of bids on subcontracts;

5 **[(6)] (9)** provisions designed to ensure that a fiscal disadvantage to
6 the State does not result from an inadequate response by minority business
7 enterprises to a request for bids;

8 **[(7)] (10)** provisions relating to joint ventures, under which a bidder
9 may count toward meeting its minority business enterprise participation goal, the
10 minority business enterprise portion of the joint venture;

11 **[(8)] (11)** consistent with **[(§ 14-302(a)(5))] § 14-302(A)(8)** of this
12 subtitle, provisions relating to any circumstances under which a unit may waive
13 obligations of the contractor relating to minority business enterprise participation;

14 **[(9)] (12)** provisions requiring a monthly submission to the unit by
15 minority business enterprises acknowledging all payments received in the preceding
16 30 days under a contract governed by this subtitle;

17 **[(10)] (13)** a requirement that a unit shall verify and maintain data
18 concerning payments received by minority business enterprises, including a
19 requirement that, upon completion of a project, the unit shall compare the total dollar
20 value actually received by minority business enterprises with the amount of contract
21 dollars initially awarded, and an explanation of any discrepancies therein;

22 **[(11)] (14)** a requirement that a unit verify that minority business
23 enterprises listed in a successful bid are actually participating to the extent listed in
24 the project for which the bid was submitted;

25 **[(12)] (15)** provisions establishing a graduation program based on the
26 financial viability of the minority business enterprise, using annual gross receipts or
27 other economic indicators as may be determined by the Board;

28 **[(13)] (16)** a requirement that a bid or proposal based on a solicitation
29 with an expected degree of minority business enterprise participation identify the
30 specific commitment of certified minority business enterprises at the time of
31 submission;

32 **[(14)] (17)** provisions promoting and providing for the counting and
33 reporting of certified minority business enterprises as prime contractors;

34 **[(15)] (18)** provisions establishing standards to require a minority
35 business enterprise to perform a commercially useful function on a contract;

1 ~~[(16)]~~ **(19)** a requirement that each unit work with the Governor's
2 Office of Minority Affairs to designate certain procurements as being excluded from
3 the requirements of § 14-302(a) of this subtitle; and

4 ~~[(17)]~~ **(20)** other provisions that the Board considers necessary or
5 appropriate to encourage participation by minority business enterprises and to protect
6 the integrity of the procurement process.

7 (c) The regulations adopted under this section shall specify that a unit may
8 not allow a business to participate as if it were a certified minority business enterprise
9 if the business's certification is pending.

10 14-309.

11 The provisions of §§ 14-301 through 14-305 of this subtitle, and any regulations
12 adopted under those sections, shall be of no effect and may not be enforced after July
13 1, ~~[2012]~~ **2016**.

14 SECTION 2. AND BE IT FURTHER ENACTED, That the Certification Agency,
15 in consultation with the General Assembly and the Office of the Attorney General,
16 shall initiate a study of the Minority Business Enterprise Program to evaluate the
17 Program's continued compliance with the requirements of the Croson decision and any
18 subsequent federal or constitutional requirements. In preparation for the study, the
19 Board of Public Works may adopt regulations authorizing a unit of State government
20 to require bidders and offerors to submit information necessary for the conduct of the
21 study. The Board of Public Works may designate that certain information received in
22 accordance with regulations adopted under this section shall be confidential.
23 Notwithstanding that certain information may be designated by the Board of Public
24 Works as confidential, the Certification Agency may provide the information to any
25 person that is under contract with the Certification Agency to assist in conducting the
26 study. The study shall also evaluate race-neutral programs and other methods that
27 can be used to address the needs of minority businesses. The final report on the study
28 shall be submitted to the Legislative Policy Committee of the General Assembly before
29 September 30, 2015, so that the General Assembly may review the report before the
30 2016 Session.

31 SECTION 3. AND BE IT FURTHER ENACTED, That having considered the
32 evidence of discrimination against minority- and women-owned businesses included
33 in the study entitled "The State of Minority- and Women-Owned Business Enterprise:
34 Evidence from Maryland" published on February 17, 2011 (the Study), and other
35 evidence generally available to the General Assembly, it is the intent of the General
36 Assembly to eliminate discrimination against minority- and women-owned businesses
37 doing business in Maryland contracting markets in a manner that:

38 (1) complies with the United States and Maryland Constitutions;

1 (2) is effective and narrowly tailored to achieve the goal of eliminating
2 business discrimination based on race and gender in Maryland contracting markets;

3 (3) makes full and effective use of race–neutral measures;

4 (4) is focused on operating an effective Minority Business Enterprise
5 Program targeted at eliminating the discrimination thoroughly documented in the
6 Study;

7 (5) to the maximum extent feasible under federal constitutional law,
8 provides for flexibility in the operations of the Program and the use of aspirational
9 numerical targets or goals;

10 (6) prohibits the use of rigid and inflexible quotas;

11 (7) ensures that any use of numerical targets in overall State goals
12 and in contract goals includes the use of good–faith waivers and is narrowly tailored to
13 reflect the best available evidence of the actual, relative availability of minority
14 business enterprises in Maryland contracting markets;

15 (8) to the maximum extent feasible, limits and ameliorates burdens on
16 nonminority business enterprises resulting from the operation of the Program;

17 (9) ensures that the beneficiaries of the Program are drawn from those
18 groups that have suffered discrimination in Maryland contracting markets; and

19 (10) promotes the development of competitively viable minority– and
20 women–owned businesses.

21 SECTION 4. AND BE IT FURTHER ENACTED, That if any provision of this
22 Act or the application thereof to any person or circumstance is held invalid for any
23 reason in a court of competent jurisdiction, the invalidity does not affect other
24 provisions or any other application of this Act which can be given effect without the
25 invalid provision or application, and for this purpose the provisions of this Act are
26 declared severable.

27 SECTION 5. AND BE IT FURTHER ENACTED, That this Act shall take effect
28 July 1, 2012.